FROM WOUNDED KNEE TO CARLISLE TO *SFFA*: AN INDIGENOUS CASE FOR AFFIRMATIVE ACTION

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Education is power. It is essential for personal development, informed decision-making, and advancement in society. Those who are well-educated have the power to change their circumstances and the circumstances of others. However, education can also be weaponized to stifle ways of thinking, crush identities, and even reshape minds. The latter is largely the story of Indigenous education in the United States.

After hundreds of years of conquest and colonization, the U.S. government, over the course of decades, forced hundreds of thousands of Native children into assimilative boarding schools. Their mission was simple—eliminate Natives as a people by eliminating what makes them Native. These schools suppressed Indigenous languages, cultures, and religions, while subjecting students to violence, sexual abuse, and even death. The harm they wrought has been reproduced across time through cultural loss, intergenerational trauma, and subsequent educational failure.

Already-burdened Native people now face a new hurdle after the Supreme Court's 2023 decision in Students for Fair Admissions, Inc. v. President & Fellows of Harvard College *("*SFFA*"). That decision likely invalidates race-conscious affirmative action in higher education, which could depress the ability of Native people to access college and improve their material conditions. But this need not be the case. Despite* SFFA*, this Note argues that the federal government has a compelling interest in remediating its historical injustices against Native peoples as a race, and it can and should do so through narrowly tailored affirmative action.*

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Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

United Nations Declaration on the Rights of Indigenous Peoples, Article 21[1]

I found that the education I had received was of no benefit to me. There was no chance to get employment, nothing for me to do whereby I could earn my board and clothes, no opportunity to learn more and remain with the whites. It disheartened me and I went back to live as I had before going to school.

Plenty Horses, member of the Lakota Sioux and former student at the Carlisle Indian Industrial School[2]

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1. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, at 7 (Oct. 2, 2007).

2. Robert M. Utley, *The Ordeal of Plenty Horses*, 26 AM. HERITAGE 15, 16 (1974). After his time at Carlisle, Plenty Horses felt disassociated from both his own people and white America, and he later joined a Native armed resistance group. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLE'S HISTORY OF THE UNITED STATES 156 (2014). In response to the Wounded Knee Massacre, he shot and killed U.S. Army Lieutenant Edward Casey. *Id.* at 156–57. However, he was acquitted "due to the state of war that existed." *Id.* at 157.

INTRODUCTION

The year is 1892. Just two years prior, the U.S. Cavalry slaughtered between 250 and 300 Lakota Sioux near Wounded Knee Creek in what is now South Dakota.[3] Over the past 100 years, the U.S. government, inspired by Manifest Destiny, took more and more Native land through a series of broken promises, forced expulsions, and bloody conquests.[4] And throughout the past 400 years, European colonizers decimated the pre-Columbian Indigenous population from some 100 million across the Americas to around 10 million.[5]

By this time, the young republic's violent attacks on Native populations had largely ended,[6] but the conflict was far from over. Although most U.S. citizens agreed that the "Indian Problem" still existed, the nation's consensus on how to deal with it had shifted.[7] Forced onto reservations and reduced to dependence on the federal government, Natives were no longer in a place to fight back against the United States' expansion.[8] However, according to the prevailing white-Protestant sentiment, they could not assimilate because their ways were still "savage" and "uncivilized."[9]

In order to "civilize" the Natives, the next fight would be waged not on the battlefield, but in the classroom.[10] Over the span of about 100 years, the federal government pressured and forced thousands of Native children into federally run schools,[11] which was legally permissible because Natives were considered "wards

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3. John E. Carter, *Wounded Knee Massacre*, ENCYCLOPEDIA GREAT PLAINS (David J. Wishart ed., 2011), http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.056 [https://perma.cc/5JXR-SZ53].

4. DUNBAR-ORTIZ, *supra* note 2, at 79.

5. *Id.* at 40.

6. *Id.* at 153 ("By the 1890s, although some military assaults on Indigenous communities and valiant Indigenous armed resistance continued, most of the surviving Indigenous refugees were confined to federal reservations, their children transported to distant boarding schools to unlearn their Indigenousness.").

7. *See* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928, at 10 (2d ed. 2020) ("[W]ith Indians all but completely subjugated, talk of military solution seemed increasingly inhumane to everyone except the most virulent Indian-hater.").

8. DUNBAR-ORTIZ, *supra* note 2, at 153.

9. ADAMS, *supra* note 7, at 8 ("Indian life, it was argued, constituted a lower order of human society. In a word, Indians were savages because they lacked the very thing whites possessed—civilization.").

10. *Id.* at 31 ("The war against Indians had now entered a new phase. Conquering a continent and its aboriginal peoples had been a bloody business . . . . Now the war against savagism would be waged in a gentler fashion. The next Indian war would be ideological and psychological, and it would be waged against children.").

11. *See* DUNBAR-ORTIZ, *supra* note 2, at 212 (estimating that federal boarding schools operated from 1875 to the 1970s).

of the state."[12] Some schools were located on or near reservations,[13] while others were across the country.[14] Native parents generally could not see their children during the school year, and in some cases, could not see them at all.[15] At these schools, Natives would learn to look, think, and work "like Americans"[16]—or so that was the idea.

Later, however, those efforts would prove to be in vain. Due to the ineffectiveness of the boarding schools, Congress began turning over the responsibility of educating young Natives to the tribes themselves and to public school systems,[17] and during the Termination Era,[18] sought to eliminate federal support to tribes altogether.[19] Finally, in 2023, after centuries of Indigenous destruction at the hands of the U.S. government, the Supreme Court seemingly closed the door on many Natives seeking admission into higher education.[20] This Note is about that decision, the cases leading up to that decision, its place in the context of Native American history, and what it means for the future.

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In the wake of the Civil Rights Movement, affirmative action[21] policies became popular at universities around the country.[22] Undoubtedly due to that context and the history of anti-Black racism in this country, affirmative action has largely been justified as a way to, at least partially, remedy the legacy of slavery,

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12. *See* ANDREW WOOLFORD, THIS BENEVOLENT EXPERIMENT: INDIGENOUS BOARDING SCHOOLS, GENOCIDE, AND REDRESS IN CANADA AND THE UNITED STATES 73 (2015); *see also* United States v. Kagama, 118 U.S. 375, 383 (1886) ("These Indian tribes *are* the wards of the nation.").

13. ADAMS, *supra* note 7, at 33–36 (discussing reservation day schools and reservation boarding schools).

14. *Id.* at 56–64 (discussing off-reservation boarding schools).

15. *Id.* at 36 ("The chief advantage of the boarding school was that it established greater institutional control over the children's lives, with students being kept in school eight to nine months out of the year. Only during the summer vacation period, and in some instances the Christmas holidays, were students allowed to return to their homes.").

16. *See id.* at 64 ("[O]nly by attending boarding schools could savage institutions, outlooks, and sympathies be rendered extinct. Only by attending boarding schools could Indian youths, stripped bare of their tribal heritage, take to heart the inspiring lessons of white civilization.").

17. *Id.* at 347–48.

18. The road toward terminating federal support of Native tribes began after World War II and officially commenced in 1953 through the Termination Act. *See* DUNBAR-ORTIZ, *supra* note 2, at 173. Enforcement of the Termination Act ceased in 1961, but the law remained on the books until 1988. *Id.* at 175.

19. *See id.* at 173–74.

20. *See infra* Section II.B (discussing Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023)).

21. For the purposes of this Note, "affirmative action" means any policy that targets racial/ethnic minorities for the conferral of some benefit (e.g., admission to a university or hiring for a government position). Generally, this Note will discuss affirmative action in relation to higher education, but the term applies in equal force to other contexts.

22. *See* Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 375–82 (2004) (discussing the origins of affirmative action policies at law schools).

Jim Crow segregation, and the resultant poor socioeconomic status of Black Americans.[23] This, of course, is not to say that other minorities have been left out of affirmative action, but their stories have not been heard in equal force.

Indeed, scholars have written staggeringly little about Native Americans' unique case for affirmative action. And much of the literature concerning legal "preferences" for Indigenous people has more to do with federal Indian law rather than the Supreme Court's general affirmative action jurisprudence.[24] Under federal Indian law, however, "Indian" status is considered a *political* rather than a *racial* or *ethnic* identity.[25] As such, government-provided benefits based on Indian classification are not reviewed under strict scrutiny.[26] While this provides a powerful legal tool for advocates seeking benefits for Natives, it is underinclusive—not all Native Americans are considered "Indian" for the purposes of federal Indian law.[27] In order to craft a broader argument for Indigenous affirmative action, this Note steps outside of the political classification and relies on Indigeneity as a racial or ethnic concept. Therefore, strict scrutiny will necessarily be an obstacle to overcome.

Assessing both groups as ethnic minorities, scholars have attempted to draw similarities between the history of Native Americans and that of enslaved

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23. *See, e.g.*, *id.* at 376 ("During the 1964-1967 period, when civil rights issues dominated public discourse, but affirmative action programs were still largely unknown, many within the legal education community identified low black enrollment as a problem and began to think systematically about solutions."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396–97 (1978) (opinion of Marshall, J.) ("It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes."); *SFFA*, 600 U.S. at 386–96 (2023) (Jackson, J., dissenting) (recounting the history of anti-Black discrimination and its present effects); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 899–900 (1995) ("African Americans are the paradigmatic group for affirmative action, an extraordinary remedy which was designed to ameliorate the legacy of a history of slavery and pervasive discrimination against them based on their race—a legacy that persists today. . . . [N]o other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs.").

24. *See, e.g.*, Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 966 (2002) ("[T]he equal protection requirements of the Constitution have only limited application to federal Indian legislation, because the Indian Commerce Clause of the Constitution specifically authorizes the exercise of federal power with respect to tribes in particular.").

25. Haaland v. Brackeen, 599 U.S. 255, 310 (2023) (citing Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) ("[T]he preference is political rather than racial in nature.")).

26. *See* Goldberg, *supra* note 24, at 958.

27. For example, under the Indian Child Welfare Act, an "Indian" is "any person who is a member of an Indian tribe, or who is an Alaska Native . . . ." 25 U.S.C. § 1903(3). And an "Indian tribe" is "any . . . tribe, band, nation, or other organized group or community of Indians *recognized as eligible* for the services provided to Indians . . . because of their status as Indians . . . ." *Id.* § 1903(8) (emphasis added). This legal construction of what it means to be an Indian therefore leaves out members of solely state-recognized tribes and unrecognized tribes, and Indigenous people who are not formal members of any tribe (recognized or otherwise).

Africans and their descendants.[28] This comparison, although generally correct in its assessment that both groups have and continue to be subjected to oppression, is ultimately unhelpful and trivializes the singular characteristics, experiences, and plights of both groups.

Native Americans hold the unique history of being the descendants of the original inhabitants of this land. They represent hundreds of distinct tribal affiliations,[29] cultures,[30] and languages.[31] They also hold the unique history of being systematically expulsed from the majority of their land by the U.S. government.[32] Much of their downfall and suffering has become part of the founding mythology of this country.[33]

Today, although they have made progress, Natives face some of the worst socioeconomic indicators of any minority racial or ethnic group in the United States. The homeownership rates for Natives in 2017 were at 50.8%, in comparison to 72.3% for non-Hispanic whites.[34] The median income of Native households is around $43,825, which is slightly higher than that of Blacks, lower than that of Hispanics, and much lower than the non-Hispanic white median of $68,785.[35] Additionally, Native Americans have the highest poverty rates among all ethnic minority groups, at around 25.4%.[36]

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28. *See, e.g.*, Brest & Oshige, *supra* note 23, at 877–83 (discussing the similarities and differences between Blacks and Natives as groups); David E. Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 CORNELL L. REV. 515, 530 (2005) ("Native Americans and African Americans, generally speaking, have historically endured a similar lack of rights, even though the law has treated each group quite differently. . . . Despite significant strides each group has made, the individual rights of these citizens nevertheless remain subject to vacillating interpretation, spotty implementation, and unequal enforcement.").

29. Currently, there are 574 federally recognized tribes. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 89 Fed. Reg. 944, 944 (Jan. 8, 2024).

30. *See* DUNBAR-ORTIZ, *supra* note 2, at 15–31 (describing various Native peoples).

31. *Chapter 2: Native Languages Living the Culture*, NAT'L MUSEUM OF THE AM. INDIAN, https://americanindian.si.edu/nk360/code-talkers/native-languages/ [https://perma.cc/7JB2-DM2L] (last visited Mar. 31, 2024) ("Historically, about 500 distinct Native languages were spoken in North America.").

32. *See* DUNBAR-ORTIZ, *supra* note 2, at 2.

33. *Id.*

34. Dedrick Asante-Muhammad et al., *Racial Wealth Snapshot: Native Americans*, NAT'L CMTY. REINVESTMENT COAL. (Feb. 14, 2022), https://ncrc.org/racial-wealth-snapshot-native-americans/ [https://perma.cc/5XFA-EKY8].

35. GLORIA GUZMAN, U.S. CENSUS BUREAU, HOUSEHOLD INCOME BY RACE AND HISPANIC ORIGIN: 2005–2009 and 2015–2019, at 5 tbl.2, 7, 11, 13 tbl.6 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr19-07.pdf [https://perma.cc/R8E5-D4HT].

36. Asante-Muhammad et al., *supra* note 34. Not only are Natives as a group some of the most impoverished people in the country, but reservations also tend to be characterized by poverty and neglect. *E.g.*, Tom LeGro, *Why the Sioux Are Refusing $1.3 Billion*, PBS

Natives also lag far behind in educational attainment. Only about 15% of Native Americans hold a bachelor's degree or higher, which is the lowest of any single ethnic group and less than half the national average of 32.1%.[37] In fall 2021, 28% of Natives aged 18 to 24 were enrolled in college, compared to 38% of the overall U.S. population.[38] And Native college students receive less federal Title IV financial aid on average than members of any other racial or ethnic group.[39] However, Natives who have completed postsecondary education demonstrate how impactful it can be. Ten years after graduation, Native American graduates experience income levels and homeownership rates on par with national averages.[40]

Unfortunately, the Supreme Court's recent holding in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[41] ("*SFFA*") threatens to stifle Indigenous advancement and maintain Natives' historic underclass position. But this does not need to be the case.

This Note will argue that the history of discrimination against and the current position of Native Americans justify affirmative action for their benefit in ways that the Court has never considered and that are unique to Indigenous people. Part I discusses how education specifically has always been used to oppress Indigenous peoples. Originally, this country used education to "civilize" Natives and to systematically strip them of their cultures, languages, and identities.[42] Although now much less invasive, education continues to dehumanize and disregard Native needs and history. One way to remedy this is through affirmative action.

Part II outlines the Supreme Court's relevant jurisprudence in the areas of access to education and affirmative action in higher education. Part III first critiques the Court's methodology in *SFFA* and demonstrates that the majority's holding is inconsistent with its precedent. Then, it critiques the entirety of the Court's higher education affirmative action jurisprudence and shows why the diversity rationale was doomed from the beginning.

Part IV presents the case for why *SFFA* does not end affirmative action, at least for Natives. Although *SFFA* may end the diversity interest that has supported affirmative action for about 45 years, it does nothing to end the government's

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NEWS (Aug. 24, 2011), https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23 [https://perma.cc/PZ5N-9ERH] ("Pine Ridge Reservation stretches across some of the poorest counties in the United States[]" and is "[p]lagued by an unemployment rate above 80 percent, arid land, few prospects for industry, [and] abysmal health statistics and life-expectancy rates . . . .").

37. KEVIN MCELRATH & MICHAEL MARTIN, U.S. CENSUS BUREAU, BACHELOR'S DEGREE ATTAINMENT IN THE UNITED STATES: 2005 TO 2019, at 3 tbl.1 (2021), https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-009.pdf [https://perma.cc/QQ8X-XHH3]. This also represents a 38% decrease in Native American enrollment since fall 2010. *Id.*

38. POSTSECONDARY NAT'L POL'Y INST., NATIVE AMERICAN STUDENTS IN HIGHER EDUCATION FACTSHEET 1 (2023), https://pnpi.org/wp-content/uploads/2023/11/NativeAmericanFactSheet-Nov-2023.pdf [https://perma.cc/53MD-S8XQ].

39. *Id.*

40. *Id.* at 2.

41. 600 U.S. 181 (2023).

42. *See infra* Part I.

remedial power to correct instances of discrimination. Indeed, the federal government has a strong interest in remediating decades of assimilative educational policy perpetrated against Indigenous people, and it has multiple options to do so. A brief conclusion follows.

As the Supreme Court observed in *Brown v. Board of Education*, "[E]ducation is perhaps the most important function of . . . governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[43] Those words, now 70 years old, have never been truer. But unfortunately, they have always rung hollow for the Indigenous people of this land—it's time for that to change.

I. A LONG AND TROUBLED HISTORY, IN A NUTSHELL

Before the Founders wrote and ratified the Constitution, Native Americans "had been resisting European colonization for two centuries."[44] Throughout the next century, they continued to resist as the young United States blazed westward to increase its land base and conquer the continent from coast to coast.[45] As evidenced by the current state of affairs, the United States was successful in its colonial campaign. But, as it consumed more and more land, a question faced the fledgling country: what was it going to do about the thousands of people it had conquered along the way?[46] The answer: education.[47]

A. Early Attempts at Indian Education

Since the birth of this nation, education of Indigenous people has been on the mind of the government.[48] As early as 1775, a year before the signing of the Declaration of Independence, the Continental Congress had appropriated funds for the education of Indigenous youth.[49] For the next few decades, the federal

43. 347 U.S. 483, 493 (1954).

44. DUNBAR-ORTIZ, *supra* note 2, at 79.

45. *See id.* ("Wars continued for another century, unrelentingly and without pause, and the march across the continent used the same strategy and tactics of scorched earth and annihilation with increasingly deadly firepower.").

46. *See* ADAMS, *supra* note 7, 10–11.

47. *Id.* at 20 ("The solution to the Indian problem lay in three areas: land, law, and education.").

48. HENRY SOUTHARD, TRADE, INTERCOURSE, AND SCHOOLS (1818), *reprinted in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 150, 151 (Walter Lowrie & Walter S. Franklin eds., 1834), https://dn790000.ca.archive.org/0/items/americanstatepap_d02unit/americanstatepap_d02unit_bw.pdf [https://perma.cc/8V8E-458U] ("Put into the hands of their children the primer and hoe, and they will naturally, in time, take hold of the plough; and, as their minds become enlightened and expand, the Bible will be their book, and they will grow up in habits of morality and industry, leave the chase to those whose minds are less cultivated, and become useful members of society.").

49. ALICE C. FLETCHER, BUREAU OF INDIAN EDUCATION AND CIVILIZATION: A REPORT PREPARED IN ANSWER TO SENATE RESOLUTION OF FEBRUARY 23, 1885, S. EXEC. DOC. NO. 48-95, at 161 (2d Sess. 1888), https://drive.google.com/file/d/1PSSarfAG0p74gQafmQKmaCB8G6jQBRpB/view [https://perma.cc/5H85-6YJJ].

government would provide tribes with education on an individual, treaty-by-treaty basis.[50]

This all changed in 1819, when Congress passed the first act to grant general appropriations for Indigenous education.[51] The act, called the Civilization Fund,[52] provided $10,000 annually for the education of Native Americans.[53] From then on, support for Indigenous schooling slowly increased over the century. By 1825, there were 38 Indigenous schools—mainly operated by missionaries—across the country.[54] By 1848, there were at least 103 schools.[55] And in 1869, President Grant announced his "Peace Policy," which would further expand federal support for Native education.[56]

The first iterations of Native schools came in two major varieties: reservation day schools[57] and reservation boarding schools.[58] The day schools were similar to the public schools that most Americans attend today. Native children from nearby villages or camps would go to the schools from morning to afternoon and return home for the night.[59] Education at these schools was basic, but teachers also exposed young Natives to industrial training.[60]

The reservation boarding schools were much more involved in the day-to-day lives of Native children. These schools were under the direct supervision of federal agents, and the curriculum included both primary and secondary education.[61] The boarding schools also exhibited heightened control over Native children, as students slept at the schools and only returned to their families for summer break and, in some instances, for Christmas.[62]

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50. *Id.* at 162.
51. *Id.* at 163.
52. ADAMS, *supra* note 7, at 8.
53. Indian Civilization Fund Act of 1819, ch. 85, § 2, 3 Stat. 516, 517 (codified as amended at 25 U.S.C. § 271), https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/3/STATUTE-3-Pg516b.pdf [https://perma.cc/M8WN-68HV]. The stated purpose of the Act was to "provid[e] against the further decline and final extinction of the Indian tribes . . . and for introducing among them the habits and arts of civilization . . . to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic . . . ." *Id.* § 1, 3 Stat. at 516.
54. S. EXEC. DOC. NO. 48-95, at 165.
55. *Id.* at 166.
56. ADAMS, *supra* note 7, at 10. Funding for Native education continued to grow exponentially over the ensuing decades. In 1877, Congress appropriated $20,000 for Native education, and in 1900, $2,936,080. *Id.* at 31. School enrollment likewise increased. In 1877, there were 3,598 Native students, and in 1900, there were 21,568. *Id.*
57. *See id.* at 33–35.
58. *See id.* at 35–41.
59. *Id.* at 33.
60. *Id.* ("For boys this usually meant exposing them to the world of hammers and saws and frequently included the opportunity to work in a small garden. For girls it meant working with needles and thimbles and helping in the preparation of noon meals and cleaning.").
61. *Id.* at 35.
62. *Id.* at 36.

The purpose of both systems, however, was the same: forced assimilation.[63] Because Natives differed from whites, policymakers reasoned, they must be exposed to "civilization."[64] And the way to achieve this was through education,[65] whereby Indigenous children would "be taught the knowledge, values, mores, and habits of Christian civilization."[66] Although policymakers undoubtedly saw their work as benevolent,[67] the new school system was anything but gentle. Through it, "the Indian child was to be totally transformed, all vestiges of his former self eradicated."[68]

For this reason, the later development of *off*-reservation boarding schools became favored over day schools and reservation boarding schools.[69] Day schools simply could not complete the task of assimilation because they were too close to tribal communities.[70] And reservation boarding schools, according to policymakers, suffered from the same defect.[71] Although students at these schools were separated from their families for most of the year, they tended to "slough off newly acquired civilized habits in favor of tribal ones" after living with their tribes over the summer.[72] Because of this, even the reservation boarding schools could not "exert sufficient influence over the child's minds."[73] And so would begin the next era of Native education in an abandoned military barracks in Carlisle, Pennsylvania.[74]

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63. *See id.* at 15. The aims of Native education were manifold. Most importantly, Native children had to learn how to read, write, and speak English. *Id.* at 25. Only by acquiring the English language could Natives learn the "civilized branches of knowledge . . . ." *Id.* Next, education was meant to break down Native communal mindsets and individualize each pupil. *Id.* In the viewpoint of policymakers, it was necessary that Natives "come to respect the importance of private property; they must internalize the ideal of self-reliance; and they must come to realize that the accumulation of personal wealth is a moral obligation." *Id.* at 26. Similarly, education would "reconstruct Indigenous conceptions of home and family" by emphasizing traditional white-Protestant gender roles and the nuclear family. *Id.* at 27. Finally, schools would both Christianize and nationalize Natives by inculcating in them the founding mythology of the United States. *Id.* at 28–29.

64. *See id.* at 15.

65. *Id.* at 21 ("The third area of reform was education."). According to David Wallace Adams, policymakers also pushed assimilation in two other areas: land and law. *Id.* at 20. Alongside educating young Native children, policymakers sought to end the reservation system in order to sever "Indians attachment to the tribal outlook and tribal institutions." *Id.* They also increased control over Natives by creating reservation police forces and extending federal court jurisdiction over reservations. *Id.* at 21. Education, however, was the most important of the three-prong attack because policymakers viewed it as "a seedbed of republican virtues and democratic freedoms, a promulgator of individual opportunity and national prosperity, and an instrument for social progress and harmony." *Id.*

66. *Id.* at 21.

67. *Id.* at 24. ("Education would give Indians the knowledge and skills necessary for survival in a civilized world.").

68. *Id.* at 29.

69. *See id.* at 41.

70. *Id.* at 34–35.

71. *Id.* at 36.

72. *Id.* at 37.

73. *Id.* at 36.

74. *See id.* at 54.

B. Off-Reservation Boarding Schools: A "Pernicious" Institution[75]

On November 1, 1879, Richard Henry Pratt officially opened the first off-reservation boarding school—the Carlisle Indian Industrial School.[76] Pratt's philosophy in establishing the school was summed up in his famous quote, "kill the Indian . . . and save the man."[77] While he no doubt viewed his work as saving "uncivilized" Indians from their inevitable demise,[78] in reality, off-reservation boarding schools were a brutal and traumatic place for young Indigenous people.[79]

At every level, "[t]he boarding school . . . was the institutional manifestation of the government's determination to completely restructure Indigenous minds and identities."[80] Attendance was compulsory,[81] and authorities were permitted to use force to gain parental "compliance."[82] Alternatively, the federal government threatened to withhold "rations, clothing and other annuities" from Indigenous families that did not send their children to boarding schools.[83] This was because "Indian children needed to be removed from their tribal homes for the assimilationist promise of education to be realized."[84]

The moment Native students arrived at their new "homes," the culture-stripping began.[85] First, school authorities forced students to cut their long hair.[86] This was because hair connected Indigenous people to their culture, or, in the white perspective, "long hair was symbolic of savagism; removing it was central to the new identification with civilization."[87] Along with their hair went students' traditional apparel.[88] Instead, boys would don standard suits and girls would don dresses.[89] The final part of this initial assault on Native identity required that students change their names.[90]

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75. DUNBAR-ORTIZ, *supra* note 2, at 151.

76. ADAMS, *supra* note 7, at 56.

77. *Id.* (internal quotation marks omitted).

78. *See id.* ("Pratt liked Indians, but he had little use for Indigenous cultures. Believing that Indian ways were in every way inferior to those of whites, he never questioned the proposition that civilization must eventually triumph over savagery—but this did not require the extinction of the race.").

79. *See* DUNBAR-ORTIZ, *supra* note 2, at 151. The second epigraph of this Note demonstrates just one example of the thousands of Native children who were scarred by their boarding school experiences. *See supra* note 2 and accompanying text.

80. ADAMS, *supra* note 7, at 105.

81. *Id.* at 68.

82. *Id.* at 69.

83. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 635, https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/27/STATUTE-27-Pg612.pdf [https://perma.cc/P9AX-XJJ9].

84. ADAMS, *supra* note 7, at 63–64.

85. Before the curriculum of assimilation could begin, "the school needed to strip away all outward signs of the child's identification with tribal life . . . ." *Id.* at 109.

86. *Id.*

87. *Id.* at 110.

88. *Id.* at 114.

89. *Id.*

90. *Id.* at 117. This "constituted a grave assault on Indian identity." *Id.* at 119. Traditional Indigenous names have deep cultural and educational meaning. *Id.*

After this, the battle continued in every aspect of the boarding school experience. Curriculum was calculated to impart the ways of the white man onto Indigenous pupils.[91] Most importantly, boarding schools taught Natives how to read, write, and speak English.[92] To enforce this lesson, students were prohibited from speaking their native tongues and even punished for doing so.[93] Students also learned seemingly innocuous things like math, science, and history, but schools taught these subjects so as to "prepare Indians for citizenship."[94]

Take *history* for example. At some point, teachers would have to mention U.S.–Native relations, but they couldn't expose the reality of the situation—that the history of America inherently involves the domination and genocide of Indigenous peoples.[95] So instead, to manufacture appreciation for their colonizers, teachers taught that "history was the story of man's progression from savagism, through barbarism, to civilization . . . ."[96] And if Natives just cooperated with education, they could arrive to the end of that progression.[97]

Outside the classroom, Natives continued to be inculcated with the values of white civilization. Boarding schools often resembled military training camps, which instilled in students the concepts of organization and discipline.[98] School authorities further drilled in these points through industrial training. Boarding schools put students to work—boys worked with tools and learned how to farm,[99] while girls were instructed in the "domestic sciences," such as "[s]ewing, cooking, canning, ironing, child care, and cleaning . . . ."[100] Such work was practical, as it prepared students for life outside school, but it also "taught a host of values and virtues associated with the doctrine of possessive individualism: industry, perseverance, thrift, self-reliance, rugged individualism, and the idea of success."[101] In some instances, Native students could "participate" in an "outing program,"

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91. *Id.* at 150 ("[W]hile new recruits were adjusting to institutional life, they were also being introduced to the world of the classroom and, with it, the curriculum of the white man's civilization.").

92. *Id.* at 151.

93. *Id.* at 154. Due to this rule, "some students began to lose touch with their Native tongue." *Id.* at 156.

94. *Id.* at 157.

95. *See* DUNBAR-ORTIZ, *supra* note 2, at 13–14 ("This book attempts to tell the story of the United States as a colonialist settler-state, one that, like colonialist European states, crushed and subjugated the original civilizations in the territories it now rules. . . . This is a history of the United States.").

96. ADAMS, *supra* note 7, at 161.

97. *See id.* ("If students could be brought to the point of believing, on the one hand, that the Indians' future depended upon cooperating with the efforts of the government to transform them and that, on the other, the subjugation of their race was the consequence of inevitable historical forces, then perhaps they would come to look upon their conquerors with reverential appreciation.").

98. *Id.* at 128.

99. *Id.* at 168.

100. *Id.*

101. *Id.* at 172

whereby they would live with a white family over the summer, earn a wage, and come into even closer contact with white society.[102]

Boarding schools even used extracurricular activities to press their assimilationist influence.[103] One of the best examples of this phenomenon was the Carlisle Indian School football team. The all-Native team competed against and defeated some of the best collegiate programs of the era.[104] Richard Henry Pratt, the founder of the school, saw the team as both a way to demonstrate that Natives could thrive in society and as a method for "acculturating Indians to the American value system."[105] But while the team did dominate the gridiron, Pratt's vision was not altogether successful—white society never fully accepted the team,[106] and many players eventually left the team and school with feelings of alienation[107] or chose to resist Pratt's ideals of assimilation.[108]

Besides the constant threat that boarding schools posed to Indigenous culture, they were also outright dangerous to students' physical well-being. Corporal punishment was a widely accepted practice at boarding schools.[109] Students were whipped,[110] confined in guardhouses,[111] and even made to punish each other.[112] In addition, sexual abuse ran rampant;[113] diseases such as "tuberculosis, trachoma, measles, pneumonia, mumps, and influenza" ravaged dormitories;[114] and death was

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102. *See id.* at 174–75, 179 ("Policymakers praised the outing concept as a powerful mechanism for carrying out the government's assimilationist aims.").

103. *Id.* at 165 ("At larger schools, students had the opportunity to participate in a wide range of extracurricular activities. Some—like mandolin clubs, glee clubs, debate and literary societies, drama clubs, YMCA, YWCA, and team sports—were important recreational activities but also served to further assimilate students into white society.").

104. David Wallace Adams, *More than a Game: The Carlisle Indians Take to the Gridiron, 1893–1917*, 32 W. HIST. Q. 25, 27 (2001) ("Between 1899 and 1914, . . . Carlisle dazzled the fans with their victories, defeating such football giants of the day as Harvard, Cornell, University of Pennsylvania, and Princeton." (footnote omitted)); *see also* Jackson Bednarczyk, A Forgotten Football Power: Assessing Carlisle's Rise to the Top and the Identities that Changed Football Forever (2021) (unpublished manuscript at 2) [https://perma.cc/FXE3-H4WK].

105. ADAMS, *supra* note 7, at 205 ("From football Indians would learn the value of precision, teamwork, order, discipline, obedience, efficiency, and how all those interconnected in the business of 'winning.' Football also built character by teaching prized American values like hard work, self-reliance, and self-control.").

106. *See* Adams, *supra* note 104, at 34–37; *see also* Bednarczyk, *supra* note 104, at 25.

107. *See* Adams, *supra* note 104, at 50 ("[O]nce away from the cheering crowds many returnees found that the struggle for existence in the real game of life was difficult."); *supra* note 2 and accompanying text.

108. *See* Adams, *supra* note 104, at 45–48.

109. ADAMS, *supra* note 7, at 131; *see also* DUNBAR-ORTIZ, *supra* note 2, at 212 ("Often punishment was inflicted for being 'too Indian'—the darker the child, the more often and severe the beatings. The children were made to feel that it was criminal to be Indian.").

110. ADAMS, *supra* note 7, at 132,

111. *Id.* at 133.

112. *Id.* at 134.

113. DUNBAR-ORTIZ, *supra* note 2, at 213.

114. ADAMS, *supra* note 7, at 135.

a daily aspect of boarding school existence.[115] All in all, boarding schools were no safe place for Indigenous lives and minds.[116]

Regardless, off-reservation boarding schools would boom during the late nineteenth and early twentieth centuries. After Carlisle opened in 1879, the total number of such schools rose to 27 in 1908.[117] Being forcibly removed from family and tribe and whisked off to a faraway place became a common experience for Indigenous children,[118] but one that turned out to be "useless for the purposes of effective assimilation, creating multiple lost generations of traumatized individuals."[119]

C. Termination Era to the Modern Day

In 1928, the Institute for Government Research issued a lengthy report that detailed all aspects and problems of the federal government's Native American policy.[120] This report came to be known as the "Meriam Report."[121] With regard to the school system, the Meriam Report found that it needed "a change in point of view."[122] Rather than being separated from their families, Native children should be educated "in the natural setting of home and family life."[123] Boarding schools were restrictive of development,[124] overcrowded,[125] and too focused on impractical industrial training.[126] In general, the Meriam Report recommended that "the movement away from the boarding school already under way should be accelerated

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115. *Id.*

116. *See* BRYAN NEWLAND, U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 7–9 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [https://perma.cc/7TVD-9F4B].

117. ADAMS, *supra* note 7, at 61.

118. *Id.* at 63.

119. DUNBAR-ORTIZ, *supra* note 2, at 151. The boarding schools ultimately failed in their mission. After graduating, students returned home to "deep intergenerational and cultural conflict." ADAMS, *supra* note 7, at 303. Many reverted to their pre-boarding-school ways of life. *Id.* at 311–12. And all the industrial training was for naught—"[r]eservation economies were usually wastelands of opportunity . . . ." *Id.* at 308–09. Boarding schools turned out to be "another deplorable episode in the long history of Indigenous–white relations." *Id.* at 367.

120. *See generally* LEWIS MERIAM, INST. FOR GOV'T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION (1928) [hereinafter MERIAM REPORT], https://narf.org/nill/resources/meriam.html [https://perma.cc/P6TX-BQY6].

121. ADAMS, *supra* note 7, at 362.

122. MERIAM REPORT, *supra* note 120, at 32.

123. *Id.*

124. *See id.* ("Routinization must be eliminated. The whole machinery of routinized boarding school and agency life works against that development of initiative and independence which should be the chief concern of Indian education in and out of school.").

125. *See id.* at 34. ("[I]t has been recommended that the over-crowding of boarding schools be corrected through maximum possible elimination of young children from these schools.").

126. *See id.* at 33–34 ("[I]t is specifically recommended that the industrial education be materially improved. . . . The work must be an educational enterprise, not a production enterprise.").

in every practicable manner."[127] Reservation day schools,[128] public schools,[129] and even universities[130] should fill their place.

This is exactly what happened. Support for off-reservation boarding schools waned,[131] while support for day schools increased.[132] Additionally, the federal government made contracts with local public schools to subsidize the acceptance of Native students.[133] The result was that between 1900 and 1925, the number of federal schools decreased from 253 to 209.[134] During the same time period, the number of Natives enrolled in public schools increased from 246 to 34,452 students.[135] And in 1918, the Carlisle Indian Industrial School—the first off-reservation boarding school—permanently closed its doors.[136] Throughout the twentieth century, the federal government continued to turn educational responsibility for Natives over to the states.[137] However, assimilative boarding school policy continued even into the 1970s.[138]

While boarding schools decreased in prominence, the general defederalization of Native relations culminated in the 1953 Termination Act.[139] This concurrent resolution announced the new government policy that all "Indian tribes and individual members . . . thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to

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127. *Id.* at 35.

128. *Id.* at 37 ("The Indian day schools should be increased in number and improved in quality and should carry children at least through the sixth grade.").

129. *Id.* at 36 ("The present policy of placing Indian children in public schools near their homes instead of in boarding schools or even Indian Service day schools is, on the whole, to be commended.").

130. *Id.* at 35 ("The Indian Service should encourage promising Indian youths to continue their education beyond the boarding schools and to fit themselves for professional, scientific, and technical callings. Not only should the educational facilities of the boarding schools provide definitely for fitting them for college entrance, but the Service should aid them in meeting the costs.").

131. ADAMS, *supra* note 7, at 347.

132. *Id.* at 348.

133. *Id.* at 348–49.

134. *Id.* at 349.

135. *Id.*

136. *Id.* at 354.

137. Alison McKinney Brown, *Native American Education: A System in Need of Reform*, 2 KAN. J. L. & PUB. POL'Y 105, 106, 107 (1993).

138. *Federal Indian Boarding School Initiative*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/priorities/strengthening-indian-country/federal-indian-boarding-school-initiative [https://perma.cc/7UF5-ZBA8] (last visited Apr. 5, 2024). Indian boarding schools do still exist; however, they purport to offer culturally sensitive education for Native children. Press Release, U.S. Dep't of the Interior, Secretary Haaland Announces Federal Indian Boarding School Initiative (June 22, 2021) [hereinafter *Haaland Announces*], https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative [https://perma.cc/B7D7-RWJM].

139. DUNBAR-ORTIZ, *supra* note 2, at 173–74.

Indians . . . ."[140] Following the announcement of termination, the federal government began relocating Indigenous people to urban areas, where they struggled to succeed in a world foreign to them.[141] Largely unpopular with Indigenous activists, the federal government stopped enforcing termination in 1961, but the damage had already been done—"by 1960, more than 100 Indigenous nations had been terminated."[142]

Since the end of termination and boarding school policy, Native children have consistently been at a disadvantage in public schools. At the end of the twentieth century, Native students scored significantly below average on the Scholastic Aptitude Test ("SAT").[143] Of all major ethnic groups, they faced the greatest high school dropout rates[144] and were the least likely to attend college.[145]

Unfortunately, these statistics continue to hold steady today. In contrast to only 8% of white public-school students, over one-third of Native students attend "high-poverty" public schools.[146] And with regard to standardized testing, Natives continue to lag far behind their white counterparts. In the twelfth grade, 47% of white students are proficient in reading, while only 23% of Natives are proficient.[147] Similarly, while 32% of white twelfth graders are proficient in math, only 9% of Native students are.[148]

Outside of these quantitative metrics, Native students also face an uphill battle in the classroom due to "monocultural curriculums, communication barriers, and biased textbooks."[149] In the history of the United States, education has generally been informed by Western European traditions and views.[150] Native stories are not adequately represented in textbooks, and if they are, these stories are either a footnote or footprint in the wake of the westward expansion narrative.[151] This in turn makes it difficult for Indigenous people, whose "history has been scarred by efforts

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140. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953), https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-PgB132.pdf [https://perma.cc/4CWJ-4QD7].

141. DUNBAR-ORTIZ, *supra* note 2, at 174. ("This project gave rise to large Native urban populations scattered among already poor and struggling minority working-class communities, holding low-skilled jobs or dealing with long-term unemployment.").

142. *Id.* at 175.

143. Brown, *supra* note 137, at 105 ("The average American Indian's verbal score is a full sixty-two points below the average white student's score. The average American Indian's math score is sixty-three points below the average white student's score.").

144. *Id.* at 105–06 ("In the most depressed areas of the country, the American Indian high school dropout rate was estimated to be as high as 85%.").

145. *Id.* at 105.

146. *Information on Native Students*, NAT'L INDIAN EDUC. ASS'N, https://www.niea.org/native-education-research [https://perma.cc/YM66-T5VX] (last visited Feb. 1, 2024).

147. *Id.*

148. *Id.* Native students lag behind at other grade levels as well. *Id.*

149. Brown, *supra* note 137, at 107.

150. *See id.*

151. *Id.* at 108. Indeed, the Author of this Note only truly learned about Native American history for the first time during the last semester of his undergraduate degree.

to annihilate culture and force assimilation,"[152] to adapt to the Western style of education.[153]

The history of Native American education reveals that the focus has almost always been on assimilation rather than positive development that respects traditional Indigenous lifeways. The result is a people marred by "historical trauma" and "shame [that] has rippled through generations of children,"[154] effectively cutting them off from their own cultures[155] and entrance into wider society.[156] Until recently, affirmative action programs targeting Native Americans as a minority racial group may have provided at least part of the solution to the historic discrimination against them and their underachievement in education. However, after decades of Supreme Court precedent upholding affirmative action, its future is uncertain.

II. THE "COLOR BLIND" CONSTITUTION[157]

Access to education is by no means a new issue in this country or at the Supreme Court.[158] Due to the historic effects of segregation and racism, access has often been conditioned upon students' race or ethnicity. Over time, however, the way the Court has dealt with this issue has changed. This Part, therefore, proceeds in two Sections: first, it highlights a few of the most foundational cases at the cross-section of race and education; second, it tracks the Supreme Court's affirmative action jurisprudence from *Bakke*[159] to *SFFA*.[160]

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152. Katrina Boone, *American Has Always Used Schools as a Weapon Against Native Americans*, ED POST (Dec. 12, 2018, 12:00 AM), https://www.edpost.com/stories/america-has-always-used-schools-as-a-weapon-against-native-americans [https://perma.cc/LPW8-GV2Y].

153. Brown, *supra* note 137, at 107.

154. Boone, *supra* note 152.

155. *See supra* notes 85–108 and accompanying text; *infra* notes 327–45 and accompanying text.

156. *See* CARY MICHAEL CARNEY, NATIVE AMERICAN HIGHER EDUCATION IN THE UNITED STATES 139 (1999) ("Considering the degree to which the federal government was devoted to assimilating the Indian, it is also remarkable how short-sighted and one-dimensional the program was. Indian education was preparation for only the lowest levels of society, not a comprehensive, top-to-bottom approach at educating Indians in the white manner. There was a complete lack of socioeconomic opportunity within the white society, even after such a minimal preparation for entering it.")

157. Members of the Supreme Court have oft quoted Justice Harlan's famous dissent in *Plessy v. Ferguson* for the proposition that the Constitution is "color blind." *E.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) (opinion of Roberts, C.J.) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); *id.* at 231 (Thomas, J., concurring) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)). Those same justices conveniently leave out the following, which prefaces Justice Harlan's comment: "The white race deems itself to be the dominant race in this country. *And so it is*, in prestige, in achievements in education, in wealth, and in power. So, I doubt not, *it will continue to be for all time*, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (emphasis added).

158. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

159. 438 U.S. 265 (1978) (opinion of Powell, J.).

160. 600 U.S. 181 (2023).

A. Equal Education for All?

Perhaps the most well-known Supreme Court case of all time is *Brown v. Board of Education*.[161] There, the Court overruled *Plessy v. Ferguson*'s[162] holding that "separate but equal" treatment of different races is constitutional under the Fourteenth Amendment.[163] In the context of racially segregated public schools,[164] the Court reasoned that "[s]eparate educational facilities are inherently unequal"[165] because separation by race "generates a feeling of inferiority as to [minority students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[166]

Viewing "public education in light of its full development and its present place in American life throughout the Nation,"[167] the Court noted that education may be "the most important function" of government.[168] Education is foundational for "good citizenship," learning "cultural values," "professional training," and normal adjustment to life.[169] Even in 1954, children would find it hard to succeed without proper education.[170] Therefore, where a state provides public education, it must do so "to all on equal terms."[171]

The Supreme Court later backed away from this powerful command in *San Antonio Independent School District v. Rodriguez*.[172] In *Rodriguez*, Texas law permitted and produced vast disparities in funding between school districts, depending on their local property tax revenue.[173] Sometimes these funding disparities coincided with race and ethnicity—in *Rodriguez*, for example, a poorer San Antonio district was predominantly Mexican American,[174] and a wealthier district was majority white.[175] Despite this correlation between race and educational funding, the Supreme Court found that the Texas system did not discriminate against a suspect class.[176] In fact, it did not even address racial discrimination as a possible issue.[177]

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161. 347 U.S. at 483.
162. 163 U.S. 537 (1896).
163. *Brown*, 347 U.S. at 495.
164. *Id.* at 487–88.
165. *Id.* at 495.
166. *Id.* at 494.
167. *Id.* at 492–93.
168. *Id.* at 493.
169. *Id.*
170. *Id.*
171. *Id.*
172. 411 U.S. 1 (1973).
173. Relevant here, a poor district in San Antonio generated only $26 per pupil through its local property tax, *id.* at 12, while the most affluent district in San Antonio generated $333 per pupil, *id.* at 13.
174. *Id.* at 12.
175. *Id.*
176. *Id.* at 18, 28.
177. *See id.* at 18–29.

More importantly, however, the Court held that education is not a fundamental right protected by the Constitution.[178] It did so after reasoning that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental . . . ."[179] Therefore, finding no suspect class or fundamental right, the Court employed rational-basis scrutiny, a very deferential standard of review, to ultimately uphold the Texas school system's validity under the Equal Protection Clause.[180]

Finally, in *Plyler v. Doe*, the Supreme Court somewhat walked back on *Rodriguez* and reiterated the importance of education when it was tasked with determining whether states could deny public education to undocumented noncitizens.[181] In *Plyler*, a Texas school district excluded undocumented Mexican children from attending public school.[182] Due to a confluence of unique factors—the innocence of the children involved,[183] the threat of creating a permanent underclass,[184] and the failure of the state appellants to offer an adequate interest promoted by their action[185]—the Court held that the denial of education was unconstitutional.[186]

Of most relevance to this Note is the way the Court described education. Taking a stance somewhere between those in *Brown* and *Rodriguez*, the Court affirmed that education is not a "right" protected by the Constitution, "[b]ut neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[187] Education maintains "our basic institutions";[188] it "provides the basic tools by which individuals might lead economically productive lives";[189] and it is a patch in "the fabric of our society."[190] Denial of education to some, therefore, causes everyone to bear "significant social costs."[191]

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178. *Id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

179. *Id.* at 30.

180. *Id.* at 54–55.

181. 457 U.S. 202, 205 (1982).

182. *Id.* at 206.

183. *Id.* at 219–20.

184. *See id.* at 223 ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

185. *Id.* at 230 ("It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within out boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.").

186. *See id.*

187. *Id.* at 221.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

And so, education remains in a strange constitutional limbo. It's not a right, but neither is it nothing. If a state provides free public education, it must do so without explicitly discriminating against racial minorities. But what about the reverse—can states use racial status to *benefit* minorities in education? Specifically, in the context of competitive university admissions, is race-conscious affirmative action constitutionally permissible? Or is it repugnant to *Brown*'s command of equality?

B. Affirmative Action's "Last Stand"[192]

In *Regents of University of California v. Bakke*, the Supreme Court, for the first time, was asked to determine the constitutionality of race-conscious higher education admissions policies.[193] In particular, *Bakke* concerned the University of California at Davis Medical School's ("Medical School") two-track admissions system, consisting of a general program, which did not consider applicants' race, and a special program, which did.[194]

The special program's mission was to "increase the representation of 'disadvantaged' students in each Medical School class."[195] To qualify for consideration under this program, applicants had to self-identify as members of a "minority group."[196] Qualifying applicants were exempt from the general program's GPA requirement, and they were not compared to the general applicants.[197] Instead, the Medical School admitted special applicants until it reached its prescribed number for the year.[198]

Upon reviewing the constitutionality of the Medical School's admissions system under the Equal Protection Clause, a fractured Supreme Court produced six opinions, none of which commanded a majority of the justices.[199] Instead, Justice Powell announced the judgment of the Court and issued an opinion with which two distinct groups of four justices concurred in part.[200]

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192. In 1876, then-Lieutenant Colonel George A. Custer died fighting Sioux and Cheyenne warriors at the Battle of the Little Bighorn. DUNBAR-ORTIZ, *supra* note 2, at 151–52. This battle is now popularly remembered as "Custer's Last Stand." *See Battle of the Little Bighorn*, HIST., https://www.history.com/topics/native-american-history/battle-of-the-little-bighorn#battle-of-the-little-bighorn-custer-s-last-stand [https://perma.cc/M3DF-A2KL] (Dec. 31, 2020). Following the battle, Custer was posthumously promoted to general. DUNBAR-ORTIZ, *supra* note 2, at 152.

193. 438 U.S. 265, 281 (1978) (opinion of Powell, J.) ("We granted certiorari to consider the important constitutional issue.").

194. *Id.* at 272–75.

195. *Id.* at 272.

196. *Id.* at 274. The Medical School defined "members of a minority group" as Blacks, Chicanos, Asians, and Native Americans. *Id.*

197. *Id.* at 275.

198. *Id.*

199. *See generally id.*

200. Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens concurred in the judgment that the Medical School's current admissions policy was unlawful. *Id.* at 271. Justices Brennan, White, Marshall, and Blackmun concurred in the judgment that the Medical School could consider race in its admissions policy. *Id.* at 272.

Justice Powell began his opinion by finding that the special admissions program was "undeniably a classification based on race and ethnic background."[201] Therefore, for the Medical School's special admissions policy to be constitutional, it must withstand strict scrutiny or, in other words, be "precisely tailored to serve a compelling governmental interest."[202] On the compelling-interest inquiry, the Medical School advanced four possible interests,[203] but Justice Powell concluded that only one of them was adequate: educational diversity.[204]

This interest is grounded in academic freedom, which "has been viewed as a special concern of the First Amendment."[205] Universities should be free to determine how they structure education, and this freedom necessarily includes admissions decisions.[206] To this end, the "contribution of diversity is substantial" because ethnically or racially diverse students may bring unique perspectives that "enrich" learning and equip others to better serve a heterogeneous society.[207] However, Justice Powell advised, racial diversity is just one of many factors a university should consider in achieving this compelling interest.[208]

Largely for that reason, Justice Powell concluded that the Medical School had failed to narrowly tailor its consideration of race.[209] He reasoned that its program was not narrowly tailored because it was "focused *solely* on ethnic diversity" and would therefore hurt, rather than promote, the diversity of *all* relevant identities.[210] This turned the program into a racial quota that insulated certain minority applicants from meaningful comparison to other applicants who may offer non-racial diversity benefits.[211] As a result, Justice Powell held the special admissions program

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201. *Id.* at 289. Historically, white applicants could only compete for spots through the general program. *Id.* But because "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color," the fact that whites were the affected class was immaterial. *Id.* at 289–90.

202. *Id.* at 299.

203. Through its affirmative action program, the Medical School sought to: (1) reduce the historic lack of racial minorities in medical school and medicine, (2) counteract discrimination, (3) increase the number of physicians in underserved communities, and (4) promote the educational benefits that stem from a diversity. *Id.* at 306.

204. *Id.* at 311–12, 314. Justice Powell's response to the Medical School's interest in counteracting discrimination will be the most relevant to Parts III and IV of this Note. He conceded that states have "a legitimate and substantial interest in ameliorating . . . the disabling effects of identified discrimination." *Id.* at 307. However, because the Medical School failed to identify specific instances of discrimination, its interest in remedying discrimination broadly was too "amorphous" and "may be ageless in its reach to the past." *Id.* at 307, 308–09.

205. *Id.* at 312.

206. *Id.* This is similar to Justice O'Connor's deference rationale in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

207. *Bakke*, 438 U.S. at 313–14.

208. *Id.* at 314.

209. *Id.* at 320.

210. *Id.* at 315. As Justice Powell previously mentioned, the permissible diversity interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.*

211. *Id.* at 315–16.

unconstitutional under the Fourteenth Amendment; however, he left the door open for future affirmative action policies that "involv[e] the competitive consideration of race and ethnic origin."[212]

For almost 30 years, Justice Powell's opinion in *Bakke* would serve as the Supreme Court's only guidance to lower courts on the constitutionality of affirmative action policies in higher education.[213] Then, in 2003, the Supreme Court clarified the standing of Justice Powell's opinion through two cases challenging the University of Michigan's ("UM") admissions programs.[214]

In the first of these two cases, *Grutter v. Bollinger*, the Court reviewed UM's law school ("Law School") admissions program.[215] Through this program, the Law School sought to enroll a "critical mass" of historically underrepresented minorities.[216] However, the Law School did not limit the diversity it was looking for strictly to race; rather, it recognized many possible diversity contributions for which it would give weight in the admissions process.[217] The admissions program also did not operate to enroll a specific number or percentage of minority students,[218] but instead to achieve its "critical mass" goal.[219]

A divided Supreme Court upheld the Law School's use of race in its admissions program.[220] The Court first affirmed the compelling interest in diversity, which Justice Powell had identified in his *Bakke* opinion.[221] And it did so after deferring to the Law School's judgment that racial diversity is essential to

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212. *Id.* at 320.

213. *See* Grutter v. Bollinger, 539 U.S. 306, 323 (2003) ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies."). But uncertainty about *Bakke*'s holding produced divergent results throughout the courts of appeals. *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 2003) ("[A]ny consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest . . . ."), *with* Smith v. Univ. of Wash., L. Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) ("[E]ducational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.").

214. *See* Gratz v. Bollinger, 539 U.S. 244, 249–76 (2003); *Grutter*, 539 U.S. at 311–44.

215. *Grutter*, 539 U.S. at 311.

216. *Id.* at 316. The Law School defined "historically underrepresented minorities" as African Americans, Hispanics, and Native Americans. *Id.* And, according to the Law School, "critical mass" referred to "meaningful representation . . . that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318 (internal quotation marks omitted).

217. *Id.* at 316. While race was determinative in some students' admissions, it often played no role in others. *Id.* at 319. And even though race was a strong factor for many members of minority groups, it was "not the predominant factor in the Law School's admissions calculus." *Id.* at 320.

218. *Id.* at 318.

219. *Id.* at 316, 318, 319. Had the Law School not considered race in admissions, it predicted that it would be unable to maintain a "critical mass" of minority students. *Id.* at 318, 320.

220. *Id.* at 343–44.

221. *Id.* at 325, 328.

education.[222] Additionally, it emphasized that the Law School's "critical mass" goal was defined in relation to the educational benefits flowing from diversity, which are "substantial."[223]

With regard to narrow tailoring, the Court relied on Justice Powell's opinion in *Bakke* to outline five prongs that race-conscious admissions programs must meet to pass strict scrutiny: (1) the program must not be a racial quota;[224] (2) it must evaluate each applicant as an individual, without making race the most salient element of any applicant's profile;[225] (3) the university must have considered workable race-neutral alternatives;[226] (4) the program must not "unduly harm" applicants not benefited by racial considerations;[227] and (5) it must be time limited.[228] The Court found that the Law School met each of these prongs; therefore, its admissions program was constitutional.[229]

However, in the second case, *Gratz v. Bollinger*, the Supreme Court held that UM's race-conscious *undergraduate* admissions program was not narrowly tailored to achieve the compelling interest in diversity.[230] From 1995 to 2000, UM admitted "virtually every qualified" African American, Hispanic, or Native American applicant.[231] Focusing on the most recent iteration of the admissions program, which automatically awarded each minority applicant 20 points towards admission, the Supreme Court found that UM had failed to provide individualized

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222. *Id.* at 328. In deferring to the Law School's judgment, the Court presumed good faith on the part of the Law School absent a contrary showing. *Id.* at 329.

223. *Id.* at 330. Such benefits include "cross-racial understanding," preparation for a "diverse workforce and society," and general exposure to different "people, cultures, ideas, and viewpoints." *Id.* The Court also found that diversity in education is necessary to accomplish the American ideal—equality and participation by all people in all facets of life. *Id.* at 332.

224. *Id.* at 334.

225. *Id.* at 336–37.

226. *Id.* at 339.

227. *Id.* at 341.

228. *Id.* at 342. The Court advised that 25 years from the issuance of the opinion race-conscious college admissions programs would no longer be necessary. *Id.* at 343.

229. *Id.* at 334. With regard to the first prong, the Court cited the variance in the percentage of enrolled minority students between 1993 and 1998 to demonstrate that the program was inconsistent with a racial quota. *Id.* at 336. The Court also found that the Law School analyzed each applicant as an individual and considered "all the ways [one] might contribute to a diverse educational environment." *Id.* at 337. The Law School gave no fixed bonus points to minority applicants; *all* admitted students were judged as qualified; the Law School considered multiple non-racial characteristics; and many nonminority applicants were admitted with lower test scores and grades than their minority counterparts. *Id.* at 337–38. On the third prong, the Court found that the Law School had adequately considered other race-neutral alternatives, and those "alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Id.* at 340. Finally, on the fourth prong, the Court concluded that the program did not unduly harm nonminority applicants because the Law School considered other characteristics besides race and did *in fact* admit nonminority applicants "who ha[d] greater potential to enhance student body diversity . . . ." *Id.* at 341.

230. 539 U.S. 244, 275 (2003).

231. *Id.* at 253–54.

consideration to every applicant.[232] In effect, the policy made race the decisive factor for every admitted minority student.[233] Unlike a policy that individually evaluates all diversity contributions a given applicant could make, including race,[234] UM's policy failed to adequately weigh "differing backgrounds, experiences, and characteristics" through its blanket point system.[235] Accordingly, the Court held that the policy violated the Equal Protection Clause of the Fourteenth Amendment.[236]

After a brief hiatus from the Supreme Court, the issue of affirmative action returned in 2013—but initially only for clarification of the standard of review.[237] In *Fisher v. University of Texas I*, the Fifth Circuit Court of Appeals had held that a petitioner could only challenge whether a university's use of race in admissions was a decision made in "good faith."[238] Therefore, in the Fifth Circuit's opinion, *Grutter* commanded deference to universities in both the compelling-interest and narrow-tailoring inquiries.[239] The Supreme Court flatly rejected this interpretation of *Grutter*[240] and remanded.[241] Relying on its general affirmative action jurisprudence,[242] the Court explained that "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny . . . ."[243] Thus, it was improper for the Fifth Circuit to presume narrow tailoring rather than "giving close analysis to the evidence of how the [admissions program] works in practice."[244]

However, the controversy over the University of Texas's ("UT") undergraduate admissions policy did not end there because in 2015 the case came back up to the Supreme Court on the merits.[245] This time the Court affirmed the Fifth Circuit and held that UT's use of race in undergraduate admissions was narrowly tailored to promote the permissible goal of diversity.[246] Upon review of UT's program, the Court first assessed whether the university had "articulated its compelling interest with *sufficient clarity*."[247] The Court explained that "[a]

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232. *Id.* at 271.

233. *Id.* at 272.

234. *Id.* at 272–73 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, app. at 324 (1978)).

235. *Id.* at 273.

236. *Id.* at 275.

237. *See* Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 314 (2013).

238. 631 F.3d 213, 236 (5th Cir. 2011), *vacated*, 570 U.S. 297 (2013). Additionally, the court of appeals presumed good faith, thus placing the burden on the petitioner to rebut the presumption. *Id.* at 231–32.

239. *Id.* at 232.

240. *Fisher I*, 570 U.S. at 313.

241. *Id.* at 315.

242. *E.g.*, *id.* at 313 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

243. *Id.* at 314.

244. *Id.* at 313.

245. Fisher v. Univ. of Tex. (*Fisher II*), 579 U.S. 365, 369–89 (2016).

246. *Id.* at 376, 388.

247. *Id.* at 380 (emphasis added). This is very different than the highly deferential approach taken by the Court in *Grutter*. There, the Court, relying on Justice Powell's *Bakke* opinion, explained that its "conclusion that the Law School ha[d] a compelling interest in a

university's goals cannot be elusory or amorphous"; rather, "they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."[248] Ultimately, the Court upheld UT's diversity interest, but only after finding that it had "articulated concrete and precise goals."[249]

Moving on to the narrow-tailoring inquiry, the Court admittedly found itself in an awkward place because UT employed a two-track program that combined automatic admission for applicants graduating at the top of their high school class with a holistic process that considered race.[250] But in the end, the Court could not fault UT for using race-conscious means, for its race-neutral efforts had not succeeded in promoting racial diversity.[251] In reality, the university's affirmative action policy had had a positive, but small, effect on overall diversity, which weighed in favor of narrow tailoring.[252] Additionally, none of the proposed alternatives to the policy were workable means for UT to achieve its diversity goals.[253] The result: affirmative action in higher education would live to fight another day.

But that day would not last long. In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the Supreme Court reassessed whether racial diversity is a compelling state interest that can support race-conscious admissions policies.[254] In doing so, the Court did not explicitly overrule *Grutter* or hold that diversity could *never* be a compelling interest, but, as Justice Thomas wrote, it may as well have done so.[255]

SFFA was a consolidated case concerning the affirmative action admissions policies of two universities: Harvard College and the University of North

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diverse student body [was] informed by [its] view that attaining a diverse student body [was] at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent a 'showing to the contrary.'" Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978) (opinion of Powell, J.)). This change in judicial deference foreshadowed the outcome of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

248. *Fisher II*, 579 U.S. at 381.

249. *Id.* Those goals were very similar to those outlined in *Grutter*. *Compare id.* at 381–82, *with Grutter*, 539 U.S. at 330–31.

250. *See Fisher II*, 579 U.S. at 377–78.

251. *Id.* at 383 ("[T]he demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002.").

252. *Id.* at 384–85 ("The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring . . . .").

253. *Id.* at 385, 387–88. In the past, the University had attempted to and was unsuccessful in increasing diversity through race-neutral means. *Id.* Also, the Court explained, expanding the percent plan to account for all admissions would actually hinder the University's diversity interest because it would limit the kinds of students the University could enroll. *Id.* at 386–87 ("Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others.").

254. *See* 600 U.S. 181, 214–18 (2023).

255. *Id.* at 287 (Thomas, J., concurring) ("The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.").

Carolina ("UNC").[256] Both universities factored in applicants' races at multiple stages throughout their admissions processes.[257] For Harvard, "race [was] a determinative tip for approximately 45% of all admitted African American and Hispanic applicants."[258] And for UNC, the "plus" awarded for race could "be significant in an individual case and tip the balance toward admission of the student . . . ."[259]

Following guidance from *Fisher II*, the Court first determined whether the universities' stated interests in diversity could be "subjected to meaningful judicial review."[260] On this point, the Court departed from *Grutter*'s deferential standard and Justice Powell's emphasis on academic freedom and instead relied on two new requirements: (1) whether the universities' goals were "sufficiently coherent";[261] and (2) whether the universities "articulate[d] a meaningful connection between the means they employ[ed] and the goals they pursue[d]."[262]

The Court found against the universities in both regards.[263] Although both schools advanced goals remarkably similar to those validated in *Grutter*,[264] the Court now found them "inescapably imponderable" and "standardless."[265] And neither did they have any meaningful connection to the use of race-conscious admissions because racial categories are too "imprecise."[266] Therefore, because "[b]oth programs lack[ed] sufficiently focused and measurable objectives

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256. *Id.* at 190–91 (majority opinion).

257. *Id.* at 194–95, 195–97.

258. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 178 (D. Mass. 2019), *rev'd*, 600 U.S. 181 (2023).

259. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 601 (M.D.N.C. 2021), *rev'd sub nom.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

260. *SFFA*, 600 U.S. at 214.

261. *Id.* at 214.

262. *Id.* at 215.

263. *Id.* at 214, 215.

264. In *SFFA*, Harvard advanced four benefits: "(1) 'training future leaders in the public and private sectors'; (2) preparing graduates to 'adapt to an increasingly pluralistic society'; (3) 'better educating its students through diversity'; and (4) 'producing new knowledge stemming from diverse outlooks.'" *Id.* at 214 (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 98 F.3d 157, 173–74 (1st Cir. 2020)). Additionally, UNC advanced five benefits: "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d at 656.

265. *SFFA*, 600 U.S. 181, 215. For example, the Court explained, there is no way to measure "whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently enhance[s] appreciation, respect, and empathy,' or effectively train[s] future leaders' . . . ." *Id.* (alterations in original) (citations omitted).

266. *Id.* at 216–17. For example, according to the Court, the universities would prefer a class with 15% of students from one Latin American country over a class with 10% of students from multiple countries "simply because the former contains more Hispanic students than the latter." *Id.* at 279.

warranting the use of race," the Court found that they violated the Equal Protection Clause.[267]

If that wasn't enough, the Court also found that the universities used race against certain individuals and as a stereotype[268] and that the programs lacked a "logical end point."[269] In light of this, even though the Court seemingly limited its holding to the parties,[270] it is unclear how any university could ever sustain a race-conscious admissions policy under the diversity rationale.

III. DESTINED TO FAIL

Before presenting the Indigenous case for affirmative action, it is worth demonstrating the failings of the Supreme Court's existing affirmative action jurisprudence. First, this Part shows how *SFFA* fails to distinguish itself from affirmative action jurisprudence if it aims to simply apply *Grutter* rather than overturn it. Second, it shows that affirmative action, in the way the Court originally accepted it, was destined to fail from the start.

A. Overturning Without Overturning

As discussed in Section II.B, *SFFA* essentially overturned *Grutter*'s diversity rationale and affirmative action without explicitly saying so. But if *SFFA* was meant to be read as holding only that the admissions policies at issue did not satisfy the Court's affirmative action precedents, then the Court did a woefully inadequate job at distinguishing it from other cases.

The facts of *Grutter*, *Fisher II*, and *SFFA* are remarkably similar. In *Grutter*, the Law School employed affirmative action to enroll a "critical mass" of historically underrepresented minorities;[271] it looked for diversity across multiple characteristics;[272] and it analyzed each applicant as an individual without giving a predetermined bonus to students of a particular race.[273] To justify its use of race in admissions, the Law School sought to break down racial barriers and stereotypes, promote collaboration and understanding, prepare students for diverse work environments, and expose students to various cultures and viewpoints.[274]

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267. *Id.* at 230.

268. *Id.* at 218. On the first point, the Court observed that "[c]ollege admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 218–19. On the second, the Court flatly rejected the universities' contention that there exists "an inherent benefit in race *qua* race . . . ." *Id.* at 220.

269. *Id.* at 221 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)); *see also id.* at 316 (Kavanaugh, J., concurring) (footnote omitted) ("[T]he Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education.").

270. *Id.* at 218 ("The programs *at issue here* do not satisfy [strict scrutiny]." (emphasis added)).

271. *Grutter*, 539 U.S. at 316.

272. *Id.*

273. *Id.* at 337–38.

274. *Id.* at 330; *see also supra* note 223 and accompanying text.

In *Fisher II*, UT evaluated individual applicants based on their personal essay scores, letters of recommendation, extracurricular activities, socioeconomic status, SAT scores, and race, among several other factors.[275] Through this program, UT aimed to ameliorate stereotypes, encourage the exchange of ideas, expose its students to other cultures, and create future leaders.[276]

So too in *SFFA*, Harvard considered "academic, extracurricular, athletic, school support, [and] personal" factors, alongside race, in its admissions process.[277] Likewise, UNC made race one factor out of many, including "academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background."[278] Both schools also advanced goals similar to those in *Grutter* and *Fisher II*. For example, Harvard sought to prepare students for a pluralistic society and to introduce them to diverse viewpoints, while UNC intended to promote the exchange of ideas, enhance cross-racial empathy and understanding, and break down stereotypes.[279]

Despite these similarities, *SFFA* completely diverged from *Grutter* and *Fisher II*. In *Grutter*, the Court found that the Law School had engaged in "a highly individualized, holistic review of each applicant's file . . . afford[ing] this individualized consideration to applicants of all races."[280] But in *SFFA*, the schools used race as a "negative" and a "stereotype."[281] In *Grutter*, the goals of affirmative action were "substantial" and "real,"[282] and in *Fisher II*, the goals were "concrete and precise."[283] In *SFFA*, however, the goals could not "be subjected to meaningful judicial review" and were not "sufficiently coherent."[284] In *Grutter* and *Fisher II*, the Court presumed good faith[285] and deferred to the schools' judgments[286] that race-conscious admissions were necessary. In *SFFA*, the Court greatly curtailed deference.[287]

Now there's a headscratcher.

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275. 579 U.S. 365, 373–74 (2016).

276. *Id.* at 381–82.

277. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 194 (2023).

278. *Id.* at 196.

279. *Id.* at 214.

280. Grutter v. Bollinger, 539 U.S. 304, 330, 337 (2003).

281. *SFFA*, 600 U.S. at 218.

282. *Grutter*, 539 U.S. at 330.

283. 579 U.S. 365, 381 (2016).

284. *SFFA*, 600 U.S. at 214. Even in *Fisher II*, where the Court announced the "sufficient clarity" standard, the affirmative action program was upheld. *See supra* notes 245–47 and accompanying text.

285. *Grutter*, 539 U.S. at 329; *see Fisher II*, 579 U.S. at 384 ("Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.").

286. *Grutter*, 539 U.S. at 328; *Fisher II*, 579 U.S. at 376, 388.

287. *SFFA*, 600 U.S. at 217; *see also id.* at 252 (Thomas, J., concurring) ("[T]hose engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating.").

What is one to make of this about-face? While *SFFA*'s practical effect is clear—universities can no longer justify race-conscious admissions on the diversity rationale—its methodology is fundamentally flawed. It fails to make relevant distinctions between similar factual scenarios and does not adequately explain its reliance on new—or at best reformulated—standards, such as the requirement for "sufficient coherence" or its retreat from deference. Even if *SFFA*'s standards are viewed as a restatement of the *Fisher* duo's clarification of strict scrutiny,[288] its outcome is still unjustified. As just demonstrated, the dispositive facts of the affirmative action programs at issue in those cases were almost identical. Therefore, to reach an opposite outcome in *SFFA*, while purporting to apply *Grutter* rather than overturn it, comes across more as doublespeak[289] than reasoned decision-making.

While the *SFFA* majority cloaked its analysis in constitutionally based strict scrutiny, in reality, it looks much more like judicial activism or a change in jurisprudence due to a change in the Court's membership. Interestingly enough, this is something that Chief Justice Roberts—the author of the majority opinion in *SFFA*—and other justices have warned against in the past.[290] But as the saying goes, heads I win, tails you lose.

B. An Unstable Foundation

Although *SFFA*'s methodology is shaky, it isn't the biggest problem with the Supreme Court's affirmative action jurisprudence. Rather, Justice Powell's initial identification of the diversity rationale as the only permissible government interest supporting race-conscious admissions doomed affirmative action from the start.

In finding that diversity was a compelling interest that justified affirmative action, Justice Powell rejected two other logical proposed interests: (1) reducing the historical deficit of racial minorities in higher education and (2) combatting general

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288. *See Fisher II*, 579 U.S. at 377–78 ("*Fisher I* set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative action program.").

289. The idea of "doublespeak" has some origin in George Orwell's classic novel, *Nineteen Eighty-Four*. *See generally* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949). There, to cope with the repression of a totalitarian government, our protagonist Winston engages in "doublethink." *Id.* at 30. This allows him "[t]o know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory, and believing in both of them, to use logic against logic . . . ." *Id.*

290. Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) ("[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."); *see also id.* at 720 (Scalia, J., dissenting) ("With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the 'reasoned judgment' or a bare majority of this Court—we move one step closer to being reminded of our impotence."); *id.* at 742 (Alito, J., dissenting) ("I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.").

racial discrimination.[291] As already demonstrated, this would later color the analysis in *Grutter*, which relied heavily on Justice Powell's opinion and temporarily enshrined diversity as a valid compelling interest.[292]

For all the reasons cited by universities, from California at Davis in *Bakke* to Harvard and UNC in *SFFA*,[293] the diversity rationale does make some sense. Education is all about exposure to new ideas and ways of thinking. It's also about preparing students to exist and succeed in a complex world. Surely racial and ethnic diversity—at some level a proxy for varied viewpoints and experiences—in the classroom can assist educators and governments in achieving both of these goals. By interacting with members of other ethnicities in structured environments, students gain something that simply cannot be reproduced in a more homogenous setting.

However, the first problem with this idea is that it's a facade. Although the Supreme Court accepted diversity as the rationale for race-conscious admissions, "the overriding justification for affirmative action has always been its impact on minorities."[294] This is self-evident from the historical context in which affirmative action was initially created—the Civil Rights Movement.[295] Of course, diversity does bring benefits to the learning experience, but it is unlikely that anyone "would enthusiastically support preferential admission policies if we did not believe they played a powerful, irreplaceable role in giving nonwhites in America access to higher education . . . ."[296] So the idea that diversity is what is truly at stake is a "deception."[297] Perhaps a recognition of this smokescreen is partly what caused the *SFFA* majority to be so suspicious of admission programs bearing such a close resemblance to ones that had been upheld in the past.

But the use of diversity as a compelling interest is not just deceiving—it is also subtly insidious in its own right. Such a construction necessarily equates the "injuries of systemic forms of racism . . . with talents such as being a good athlete or musically gifted . . . ."[298] Instead of focusing on the problem to be solved—institutional racism—the diversity interest puts "the perspective of relatively privileged white students at the center of the rationale for the program."[299] It says to minority students, "Yes, our institutions participated in a system that intentionally excluded and suppressed your identities. We now include you, not for *your* sake, but for *ours*." But in order to consciously increase minority representation in higher education, it should not be a requirement that their presence *benefits* white people.

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291. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978) (opinion of Powell, J.).

292. *See* 539 U.S. at 322–25.

293. *See supra* Section II.B.

294. Sander, *supra* note 22, at 368.

295. *See supra* notes 22–23 and accompanying text.

296. Sander, *supra* note 22, at 368.

297. *Id.* at 382.

298. Luke Charles Harris, *Regents of the University of California v. Bakke*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. OPINIONS ON RACE AND THE LAW 246, 263 (Bennett Capers et al. eds., 2022).

299. *Id.*

It should be enough that the "Constitution institutionalized the annihilation of indigenous communities, and tolerated slavery."[300]

Unfortunately, *Brown* is partly responsible for this problem. Though the outcome in *Brown* was clearly the correct one, scholars have argued that it did not go far enough.[301] *Brown* did little to cure de facto segregation because the Court failed to pull up the roots undergirding de jure segregation.[302] Rather than expose "separate but equal" as just one effect of the legacy of legalized white supremacy, the Court rested its holding largely on the psychological harm caused by segregation.[303] Thus, by divorcing segregation from ingrained societal discrimination, the Court could pretend that it eliminated oppression *in fact* by eliminating oppression *in law*.

This judicial Jedi mind trick has been repurposed over and over again. It was plainly evident in *Rodriguez*, where the Court completely ignored an instance of residential segregation,[304] and in *Bakke*, where Justice Powell found that societal discrimination was "an amorphous concept of injury that may be ageless in its reach into the past," rather than a current and continuing harm.[305] As a result, it really should come as no surprise that the diversity rationale failed. At best, it was a legal deception for the true interest at stake. At worst, it tokenized minorities and whitewashed the reality that America is "a post-genocide, post-slavery, and post-apartheid society,"[306] thereby constitutionalizing systemic discrimination.

IV. AN INDIGENOUS CASE FOR AFFIRMATIVE ACTION

SFFA threatens to create a "discrete underclass."[307] As things currently stand, Native Americans face extremely substandard socioeconomic and educational statistics.[308] And the end to affirmative action as we have known it will likely do no favors for recent advances in Indigenous quality of life. But it doesn't have to be that way. This Part attempts to demonstrate why by presenting an Indigenous case for affirmative action that passes strict scrutiny.

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300. *Id.* at 255.

301. *E.g.*, Derrick Bell, *Brown v. Board of Education*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. OPINIONS ON RACE AND THE LAW 26 (Bennett Capers et al. eds., 2022) ("[T]he court speaks eloquently of the damage segregation does to Negro children's hearts and minds, but the equating of constitutional and educational harm without cognizance of the sources of that harm will worsen the plight of black children for decades to come.").

302. *Id.* at 37 ("[T]he *Brown* majority's vision of racism as an unhappy accident of history immunizes 'the law' (as a logical system) from antiracist critique. That is to say, the majority positions the law as that which fixes racism rather than as that which participates in its consolidation.").

303. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

304. *See supra* notes 172–77 and accompanying text.

305. Regents of Univ. of California v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

306. Harris, *supra* note 298, at 257.

307. Plyler v. Doe, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

308. *See supra* notes 34–40 and accompanying text.

A. Three Qualifications

Before laying out the Indigenous case for affirmative action, a few caveats are in order. First, this Note has only recounted instances of *federal* discrimination against Native populations. Therefore, any compelling interest remedying that discrimination through affirmative action must necessarily come from the federal government. Since the vast majority of universities are operated by states or private parties, this would seem to be a problem. However, under the Taxing and Spending Clause,[309] "Congress has a broad power to set conditions for the receipt of federal funds even as to areas that Congress might otherwise not be able to regulate."[310] Therefore, this Note calls upon Congress to establish a national policy of rehabilitating Native socioeconomic status and to create a funding program for universities that conditions its receipt upon use for Indigenous affirmative action.[311] Perhaps this is wishful thinking, but every movement for social justice must start somewhere.[312]

Second, this Note does not attempt to explicitly define who counts as "Native" or "Indigenous" for the purposes of such a program. However, it does advocate for an expansive definition that is sensitive to what it means to be Native or Indigenous in a racial, ethnic, or cultural sense. Generally, federally recognized tribal citizenship or membership requires ancestry satisfied through a minimum "blood quantum."[313] But this requirement is both foreign to actual Native identity[314] and unduly restrictive in scope. There are plenty of Native Americans who are

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309. U.S. CONST. art. I, § 8, cl. 1.

310. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 245 (6th ed. 2020). Even states that have outlawed state-initiated affirmative action would be able to participate in programs like this. For example, although the Arizona State Constitution prohibits "preferential treatment to . . . any individual or group on the basis of race," it makes an exception for "action that must be taken to establish or maintain eligibility for any federal program . . . ." ARIZ. CONST. art. II, § 36(A), (B)(2).

311. This Note recognizes the fact that "[s]eparate rights, preferences, governmental recognition, and benefits for Indian nations, their members, and Indians more broadly defined have existed under federal law since the founding of the United States." Goldberg, *supra* note 24, at 944. However, it is clear that such policies have not done or gone far enough in ameliorating the effects of discrimination against Native people. Policies targeting Indigenous inequity must expand in domain (beyond merely tribal *members*) and in scope (amount of funding and areas affected).

312. *See, e.g.*, DUNBAR-ORTIZ, *supra* note 2, at 179–80 (emphasis added) ("Activists' efforts to end termination and secure restoration of land, particularly sacred sites, included Taos Pueblo's *sixty-four-year struggle* with the US government to reclaim their sacred Blue Lake in the Sangre de Cristo Mountains of New Mexico. In the *first land restitution to any Indigenous nation*, President Richard M. Nixon signed into effect Public Law 91-550 on December 15, 1970, which had been approved with bipartisan majorities in Congress.").

313. Goldberg, *supra* note 24, at 960.

314. *Id.* at 961 ("Formal, inflexible ancestry requirements [such as blood quantum] are not part of the historic practices of tribes.").

members of state-recognized tribes[315] or unrecognized tribes,[316] or who are simply not formally registered with their tribal affiliation.[317] The point is that Indigeneity has nothing to do with whether or not a government has decided to legally recognize a given tribe. What matters is a cultural and ancestral connection to the original inhabitants of this land who were dispossessed of their land and subjected to decades of harmful assimilative policy.[318] A congressional definition of "Native" or "Indigenous," therefore, should reflect this broader meaning.

Lastly, one of the biggest arguments against affirmative action is that under the Equal Protection Clause, individuals should be treated as individuals—i.e., without reference to group status.[319] While this argument has some seductive appeal, it is overly simplistic and reductive, and even more so in the context of Native American history. As explained in Part I, the overarching goal of boarding schools and assimilative educational policy was to annihilate Indigenous culture,[320] thereby "destroy[ing] Indigenous *groups* as self-sustaining and self-defining *entities*."[321] In light of this, attempts to remediate group harm on an individual-by-individual basis are ultimately futile—collective approaches to redress are necessary.[322]

B. The Interest

Although the diversity interest is likely no more,[323] the Supreme Court has identified one other relevant compelling interest that permits race-based action: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."[324] Indeed, all six justices in the *SFFA* majority opinion recognized this point.[325] While this interest has often been employed and validated

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315. *See, e.g.*, *State Recognized Tribes*, SEC'Y COMMONWEALTH, https://www.commonwealth.virginia.gov/virginia-indians/state-recognized-tribes/ [https://perma.cc/5BK7-7YW7] (last visited Apr. 5, 2024).

316. *See, e.g.*, Helen Oliff, *Can Tribes Be Unrecognized?*, P'SHIP WITH NATIVE AMS. (July 9, 2017), https://nativepartnership.org/blog/history-culture-justice-category/can-tribes-be-unrecognized [https://perma.cc/6FVS-SD7U].

317. Additionally, there are many Native people who are members of tribes that were terminated and unable to regain status. DUNBAR-ORTIZ, *supra* note 2, at 175.

318. Of course, not all Indigenous people are affected to the same degree by past discrimination. WOOLFORD, *supra* note 12, at 260. However, to some extent, all "Indigenous *communities* do feel the reverberations of historical and contemporary settler colonial practices." *Id.* (emphasis added).

319. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023) ("[A] benefit to a student whose heritage or culture motivated him or her to assume a leadership role to attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.").

320. WOOLFORD, *supra* note 12, at 290.

321. *Id.* at 289 (emphasis added).

322. *Id.* at 295.

323. *See supra* Section II.B.

324. *SFFA*, 600 U.S. at 207 (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007); Shaw v. Hunt, 517 U.S. 899, 909–10 (1996); *SFFA*, 600 U.S. at 248–51, 258–62 (Thomas, J., concurring)).

325. *See* 600 U.S at 188.

in the desegregation context,[326] this Note contends that it can also be used to justify affirmative action for Indigenous people.

As outlined above in Part I, Native Americans have suffered countless possible constitutional and statutory violations throughout decades of racist and assimilative "educational" policy. The forced or coerced removal of Native children from their homes and families, and subsequent confinement in boarding schools, violated Natives' freedom from unreasonable seizures[327] and right to due process of law.[328] Coupled with forced removal and confinement, the imposition of a single educational agenda violated Native parents' right to control the upbringing and to choose the education of their children.[329] The suppression and punishment of Indigenous language use, culture, identities, dress, and hairstyles violated Natives' freedom of speech and expression under the First Amendment.[330] The suppression of Indigenous religion violated Natives' freedom of religion,[331] and the government mandate of Christianity in boarding schools violated the Establishment Clause.[332] Finally, the government may have even committed genocide,[333] the most heinous of all crimes, against Indigenous students through all of the foregoing abuses.[334]

These violations were and continue to be disastrous for Native people. Federal boarding schools and assimilative policy completely failed in teaching anything of value to Indigenous students.[335] The curriculum prepared students "for only the lowest levels of society," and, after they graduated, students faced a

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326. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 494 (1992) ("If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.").

327. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

328. *Id.* amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

329. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("[T]he right of parents to . . . instruct their children . . . [is] within the liberty of the [Fifth Amendment].").

330. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

331. *Id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

332. *Id.* ("Congress shall make no law respecting an establishment of religion[.]").

333. Under the Genocide Convention, to which the United States is a party, "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." G.A. Res. 260 (III), at 1 (Dec. 9, 1948).

334. *See* WOOLFORD, supra note 12, at 5 (arguing that boarding schools were "coordinated to forcibly transform Indigenous peoples and thereby destroy these groups," which "is consistent with sociological understandings of the concept of genocide").

335. CARNEY, *supra* note 156, at 139–41.

"complete lack of socioeconomic opportunity within white society . . . ."[336] As the second epigraph of this Note demonstrated, many Native students returned home worse off than they left.[337] It is, therefore, no wonder why Native people and reservations continue to face such dire socioeconomic statistics.[338]

Furthermore, assimilative education taught Native kids to hate their cultures and families for their "savage" ways.[339] Students were also instructed and expected to bring the work of assimilation back to their tribal communities.[340] As a result, the harmful lessons of assimilation were felt not only by individual Native students, but by the population as a whole. This harm has been reproduced to the present day through "intergenerational trauma," which refers to how "historical traumatic events and processes affect subsequent generations across time."[341]

Sam Schimmel, an Alaska Native, experienced this exact phenomenon.[342] His grandmother, Constance, was forced to attend a boarding school 1,200 miles from her home, where she was traumatized and "taught to hate a lot of things about her culture and, by proxy, herself."[343] Because Constance "never seemed to recover a strong sense of whom she was" after her boarding school days, her trauma passed to her daughter, Sam's mother, who experienced serious mental health issues.[344]

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336. *Id.* at 139; *id.* at 74 ("By failing to provide schools [to develop] leaders, the federal government ensured that the lower-level workers were being trained for an economy that did not and would not exist.").

337. *See supra* note 2 and accompanying text.

338. *See supra* notes 34–40 and accompanying text.

339. *See* WOOLFORD, *supra* note 12, at 1–2 ("Mary was subjected to personal humiliation and the degradation of her culture. And she learned to despise her Indigenous identity."); *see also* SIERRA CRANE MURDOCH, YELLOW BIRD: OIL, MURDER, AND A WOMAN'S SEARCH FOR JUSTICE IN INDIAN COUNTRY 262 (2020) ("After the massacres, the boarding schools, the outright stealing of land, what lasted was the violence that got under a person's skin, inside a person's head. Shame became violence toward oneself and then violence toward one's own community.").

340. WOOLFORD, *supra* note 12, at 151–52, 170.

341. Melissa L. Walls & Les. B. Whitbeck, *The Intergenerational Effects of Relocation Policies on Indigenous Families*, 33 J. FAM. ISSUES 1272, 1288 (2012). Although Walls and Whitbeck's study focuses on intergenerational trauma arising out of relocation policy, they predict that "an even stronger case could be made for more insidious acculturation policies such as boarding schools on intergenerational linkages and influence." *Id.* at 1289; *see also* MURDOCH, *supra* note 339, at 355 ("In the burgeoning field of epigenetics, studies have shown that trauma and stress cause the body to produce hormones that alter the way our genes are expressed, turning these genes on or off, and that changes to our DNA might be passed from generation to generation.").

342. *See generally* Rebecca Hersher, *The Conflicting Educations of Sam Schimmel*, NPR (May 30, 2018, 8:36 AM), https://www.npr.org/sections/goatsandsoda/2018/05/30/610384132/the-conflicting-educations-of-sam-schimmel [https://perma.cc/HG8U-NLAG].

343. *Id.*

344. *Id.*

Although the impact of the trauma is muted on Sam, he continues to feel the effects of the original suppression of his family's culture and identity.[345]

The federal government, therefore, has a strong, compelling interest in remediating its historical injustices committed against Indigenous people through its educational policy. This interest is neither "an amorphous concept of injury that may be ageless in its reach into the past"[346] nor "inescapably imponderable."[347] Rather, as demonstrated in this Section and in Part I, it is "measurable and concrete."[348] The boarding school policy was centrally implemented *by the federal government* for decades.[349] It violated the constitutional and statutory rights of thousands of Indigenous people. And its harmful effects, both socioeconomic and psychological, are still felt today. Additionally, these effects are magnified when one recognizes that educational policy was just one prong of a multifaceted plan to crush Native identity.[350]

As such, this is not like an interest in "reducing the historic deficit of traditionally disfavored minorities" in higher education or "countering the effects of [general] societal discrimination . . . ."[351] Rather, it is much more like the compelling interest in integrating formerly segregated school districts. Indeed, some scholars have argued that education-based discrimination against Natives was even more horrific since, at least in some circumstances, "[e]ducation was opportunity to the blacks; to the Native Americans it was cultural genocide."[352]

For decades, the federal government failed to acknowledge and take accountability for the harms of this dark era in American history; however, it has recently taken the first steps towards reconciliation through the Federal Indian Boarding School Initiative ("Initiative").[353] As the Initiative continues its investigation into boarding schools, the government must recognize that it has a moral and legal duty to correct the direct effects of its genocidal past, lest Natives become a permanent underclass in the future.

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345. *See id.* (internal quotations omitted) ("Nothing was put in the place of where culture was. I think some of that trauma was passed onto my mother. I'm not as deeply affected as she was, of course. But I am affected by it, because she wasn't able to be a mother for a portion of my childhood, because she had to take care of herself.").

346. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

347. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 215 (2023).

348. *Id.* at 217.

349. *See supra* Part I.

350. *See* WOOLFORD, *supra* note 12, at 48 ("Not only were educational institutions supported by other institutions, such as law, health, and policing, but also these other institutions often carried out independent efforts to encourage assimilation.").

351. *Bakke*, 438 U.S. at 306 (internal quotation marks omitted).

352. CARNEY, *supra* note 156, at 136.

353. *See Haaland Announces*, *supra* note 138 ("The Federal Indian Boarding School Initiative will serve as an investigation about the loss of human life and the lasting consequences of residential Indian boarding schools."). For the Initiative's first report on boarding schools, see generally NEWLAND, *supra* note 116.

C. Narrow Tailoring

Even if the interest in remediating past constitutional violations against Indigenous people is compelling, any race-based action correcting those violations must also be narrowly tailored to pass constitutional muster.[354] Because all of the higher education affirmative action cases rely on the diversity interest, it is somewhat unclear how a court would evaluate a race-conscious program based on the interest advanced here. However, some general considerations seem relevant. First, a "reviewing court must ultimately be satisfied that no workable race-neutral alternatives would" promote the compelling interest.[355] And second, "race may never be used as a 'negative' and . . . may not operate as a stereotype."[356]

At the outset, it is also important to emphasize one massive benefit of grounding an affirmative action program for Indigenous people in Section IV.B's remedial interest—it directly connects a past government wrong with both present and future government action. The primary actor in both instances would be the same—the federal government—and the remedial action would mirror the method used to discriminate in the first place—education. Tailoring the means to fit the ends in this way should, by itself, assuage many of the concerns that the Court has exhibited throughout its affirmative action jurisprudence, and particularly in *SFFA*. Courts would not need to enter into the pedagogical task of assessing how well a particular affirmative action program "produce[s] the educational benefits of diversity";[357] instead, they would determine whether there is a sufficient nexus between the harm wrought and the remedy sought, which is the judiciary's bread-and-butter.[358]

The federal government and universities have multiple options in formulating a narrowly tailored affirmative action program under the remedial

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354. *See Bakke*, 438 U.S. at 305; Grutter v. Bollinger, 539 U.S. 306, 333 (2003); Gratz v. Bollinger, 539 U.S. 244, 270 (2003); Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 311–12 (2013); Fisher v. Univ. of Tex. (*Fisher II*), 579 U.S. 365, 388 (2016); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 207 (2023).

355. *Fisher I*, 570 U.S. at 312.

356. *SFFA*, 600 U.S. at 218. One other factor that the *SFFA* majority mentioned is that affirmative action programs need a "logical end point." *Id.* at 221 (internal quotation marks omitted) (quoting *Grutter*, 539 U.S. at 342); *see also id.* at 312–17 (Kavanaugh, J., concurring) (emphasizing the temporal requirement). Despite the majority and Justice Kavanaugh's reliance on this statement in *Grutter*, it's unclear whether a logical end point is a requirement or merely a consideration in the narrow-tailoring analysis. Regardless, it does not apply with the same force to the hypothetical affirmative action programs advocated for here. One simply cannot *ex ante* put an end point on a program seeking to remediate decades of injustice and trauma, for the deep wounds of systemic racism do not heal overnight. This is similar to the desegregation context, where court supervision of integration has, in some instances, lasted over 40 years. *See, e.g.*, Valerie Cavazos, *TUSD 40-Year Desegregation Order Could End*, KGUN 9, https://www.kgun9.com/news/local-news/tusd-40-year-desegregation-order-could-end [https://perma.cc/V8KY-TUNZ] (Apr. 22, 2021, 9:32 PM).

357. *Fisher I*, 570 U.S. at 312.

358. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) ("There remains for consideration the manner in which relief is to be accorded.").

interest. Those options and their respective advantages and disadvantages are discussed below.

1. Admissions Benefit

The most obvious way an Indigenous affirmative action program could work would be to replicate the admissions programs used by many universities prior to *SFFA*. Under a system like this, Natives applying for admission to a university would get a "plus" on their application. As explained in Section IV.B, this would not be the kind of diversity "plus" to be weighed against other factors and forms of diversity; rather, it would function as a way for the federal government to partially reverse its historical wrongs by providing more Native students with an *appropriate* and *desired* education.[359]

Based upon the remedial interest, a race-conscious admissions program tailored like this eliminates the Supreme Court's concerns in *SFFA* of race being used as a "stereotype"[360] or of diversity as a proxy for "racial balancing."[361] Such a program would not assume that a Native person brings a "diverse" perspective, nor would it assume that a non-Native person brings a "non-diverse" perspective. Instead, the plus would function as a corrective tool to address the historical fact that education was once a weapon to wage war on Indigeneity. Through the plus, more Native students will be able to attend college, choose the education that they want, determine their own future, and, one day, end any need for race-based action.

The major problem with this type of affirmative action is that it still runs into the "zero-sum" problem: "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[362] However, this is a phenomenon that, to some extent, is inherent in the concept of remedial action. When the government acts to correct past abuses committed against a particular group, it must, by definition, benefit that group over others. Therefore, zero-sum concerns should be muted in the remedial context.

2. Scholarships

The second and likely best way that the federal government could implement an Indigenous affirmative action policy is by funding scholarships that must be used for Native students. Although the government, through the Bureau of Indian Education ("BIE"), already does provide scholarships for members of

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359. A ban on considering ethnicity—in favor of race-neutral qualities—is potentially disastrous for Native college applicants. Due to the historical oppression discussed in Part I, many Native people have come to distrust white education, and there is now an influx of young Natives seeking to become first-generation college students. *See infra* notes 369–71 and accompanying text. The possible consequences of this are twofold: (1) Native students might not have the support or family experience necessary to excel in the college application process, and (2) many will be unable to benefit from race-neutral admissions considerations such as "legacy status," whereby children of former graduates receive preference. *See, e.g.*, *SFFA*, 600 U.S. at 195 (highlighting "legacy status" as one of four considerations relevant during the Harvard "lop process").

360. 600 U.S. at 213.

361. *Id.* at 223 (internal quotation marks omitted) (quoting *Fisher I*, 570 U.S. at 311).

362. *Id.* at 218–19.

federally recognized tribes, these opportunities are quite limited.[363] In fact, out of all racial and ethnic groups, Natives receive the least amount of financial aid for higher education.[364] As a result, many Native students who want to pursue higher education may not be able due to lack of funding. For those students, attending college and reclaiming their development could begin the process of reversing decades of cultural destruction and educational malpractice.

A scholarship program has multiple narrow-tailoring benefits over a race-conscious admissions program. First, because scholarships would be granted *after* determining that a given student is qualified on the merits for admission, there can be no complaints of racial balancing, stereotyping, or other "color blind" concerns. Second, as long as the federal government maintains current levels of spending on general scholarships and grants,[365] the zero-sum concern would also be diminished. While Natives may receive more scholarship money on average, this would not detract from the much broader pool of federal scholarship funds and unfairly disadvantage the vast majority of students.

Finally, this approach is supported by a decades-long history that predates the birth of modern affirmative action following the Civil Rights Movement. Indigenous nations have negotiated funding to send students to college;[366] Congress has set aside money for loans for Native college students;[367] and it has even provided Native-specific grants.[368] Of course, this action relies on federal Indian law, but the point is that the federal government has supported higher education for Indigenous people in the past. While strict scrutiny is a high hurdle to race-based action, it does not stop the government from expanding this policy to cover a much broader range of Native students.

3. Indigenous-Focused Courses and Resources

No matter how the federal government and universities attempt to increase Native presence in higher education, it is vital that they continue to support Indigenous students once they are on campus. Boarding schools and general assimilative educational policy have created a multi-generational "resistance to white education" among the Native American community.[369] So now, as more Natives enter the collegiate ranks, many are first generation students "and are often in need of particular attention to cultural and personal support systems . . . study assistance, remedial education, and vocational training."[370] But unfortunately, they tend to find themselves in "unsupportive situation[s]" and "feel isolated."[371]

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363. *See Scholarships & Internships*, BUREAU OF INDIAN EDUC., https://www.bie.edu/landing-page/scholarships-internships [https://perma.cc/JD2W-V8YA] (last visited Mar. 23, 2024).

364. POSTSECONDARY NAT'L POL'Y INST., *supra* note 38, at 1.

365. Admittedly, this is not an insubstantial ask.

366. *E.g.*, CARNEY, *supra* note 156, at 56–58.

367. *Id.* at 102.

368. *Id.* at 105, 108.

369. *Id.* at 68.

370. *Id.* at 111.

371. *Id.* at 147.

Universities can do much more to support their Native students. At places like the University of Arizona or the University of Oklahoma, where Native culture and people are prevalent, this may mean providing outlets to connect Indigenous students, supporting established student organizations, or promoting cultural events.[372] At universities where this is not the case, much more intentional and hands-on action may be required. The goal is to ensure that Indigenous students feel comfortable and supported, and to not cause unintentional assimilation. Such efforts may even have the salutary effect of increasing Native enrollment.

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As evidenced by the statistics,[373] the federal government has thus far failed to remedy the devastating effects of assimilative educational policy on Native Americans. Poverty and psychological damage persist.[374] When Natives have petitioned the government to correct its injustices, its responses have often been inadequate or have taken decades to materialize.[375] *SFFA* threatens to harm Natives further by ending programs that have increased their access to higher education.[376] But this does not have to be the case—the federal government has a compelling interest in remediating the effects of assimilative educational policy, and it has multiple narrowly tailored options to achieve that interest.

CONCLUSION

Affirmative action is controversial. Multiple current Supreme Court justices view it with suspicion, if not outright disdain,[377] and scholars have debated

372. A strong foundation for continued efforts in this area is the Native American Serving Non-Tribal Institution program. Through this program, non-tribal colleges and universities with an enrollment of at least 10% Native students can receive additional funding to "improve and expand their capacity to serve Native American [students] . . . ." *Native American-Serving Nontribal Institutions Program*, U.S. DEP'T OF EDUC., https://www.ed.gov/grants-and-programs/grants-special-populations/grants-native-alaskan-pacific/native-american-serving-nontribal-institutions-program [https://perma.cc/2MXX-HZ4B] (Mar. 13, 2024).

373. *See supra* notes 34–40 and accompanying text.

374. *See supra* notes 34–40, 335–45 and accompanying text.

375. *See, e.g.*, MURDOCH, *supra* note 339, at 27, 71 (recounting the story of how it took 50 years for the government to repay a tribal nation after purposely flooding its treaty-guaranteed reservation).

376. MARGARET ROBOTHAM & RAYMOND ARTHUR SMITH, ISSUE BRIEF: NATIVE AMERICAN AFFIRMATIVE ACTION POLICY IN THE UNITED STATES 1 (2011), https://academiccommons.columbia.edu/doi/10.7916/D8J67QW2 [https://perma.cc/M6BZ-3DB4].

377. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023) (Roberts, C.J.) ("[T]he student must be treated based on his or her experiences as an individual—not on the basis of race. Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin."); *id.* at 232 (Thomas, J., concurring) ("I write separately . . . to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination."); *id.* at

whether it is even successful in increasing effective opportunities for minorities.[378] This Note has not attempted to provide a magic bullet for all criticisms of affirmative action, both normative and empirical. Instead, its purpose is twofold: (1) to highlight the problems with the Supreme Court's affirmative action jurisprudence and (2) to advance a unique Indigenous-centered case for race-conscious action in higher education admissions.

In doing so, this Note has relied on the singular history of Indigenous people in this country—a history marred by centuries of bloodshed, land theft, and forced assimilation. Specifically, it has emphasized the ways in which the federal government purposely attempted to—and to some extent did—erase Native cultures and identities through educational policy. While it is undoubtedly true that Indigenous history in its full context presents an even stronger case for affirmative action, the benefit of narrowing the aperture to education-based discrimination is that it distills the strict-scrutiny analysis to the effects of government action bearing the closest relationship to the specific method for employing affirmative action. This logic is rooted in some of humanity's earliest recorded laws—an eye for an eye[379]—education-based remedies for education-based sins.

Other arguments can and should be leveraged to support affirmative action for Native people. Such arguments include the federal government's trust responsibility to tribes, the Indian Commerce Clause, and Native connections and entitlements to the stolen land upon which universities are built. Future works should also attempt to craft arguments relating to how *states* can directly support affirmative action without relying on a federal policy. Finally, *SFFA*'s termination of the white-centered diversity rationale should push scholars to craft specific arguments for other racial and ethnic minorities.

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This land's Indigenous people are resilient. After hundreds of years of concerted effort to erase their existence and culture, they have survived. To ensure that Indigenous people and culture not only survive but thrive in the future, the

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310 (Gorsuch, J., concurring) ("Nothing in [Title VI] grants special deference to university administrators. Nothing in it endorses racial discrimination to any degree or for any purpose."); *id.* at 316 (Kavanaugh, J., concurring) ("I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no.").

378. *Compare* Sander, *supra* note 22, at 481 ("[I]f the findings of this Article are correct, blacks are the victims of law school programs of affirmative action, not the beneficiaries."), *with* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1809 (2005) ("We find no persuasive evidence that current levels of affirmative action have reduced the probability that black law students will become lawyers. We estimate that the elimination of affirmative action would reduce the number of lawyers.").

379. *E.g.*, *Leviticus* 24:19–20 ("If anyone injures his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; whatever injury he has given a person shall be given to him."); *The Code of Hammurabi*, YALE L. SCH. (L.W. King trans. 2008), https://avalon.law.yale.edu/ancient/hamframe.asp [https://perma.cc/CUG2-ZPWA] ("If a man put out the eye of another man, his eye shall be put out.").

government has a duty to right its historical wrongs. A limited race-conscious remedy in higher education won't make up for generations of colonization and trauma, but it's a start.